Filed 7/19/16 P. v. Griffin CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND GRIFFIN, Defendant and Appellant.	E062831 (Super.Ct.No. RIF112804) OPINION

APPEAL from the Superior Court of Riverside County. Richard Todd Fields, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Eric A. Swenson and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

In 2003, a man and a woman were shot in the head, execution-style, in a parking lot on University Avenue in Riverside. Three key witnesses — Sheila Chapman, Robert

Pruitt, and Michael Newell — implicated defendant Raymond Griffin in the shooting. Each witness was a crack cocaine user; each witness had multiple prior felony convictions; each witness had a motive to lie; and each witness made various inconsistent statements.

In 2007, after a jury trial in which these three witnesses testified, defendant was found guilty on two counts of murder, as well as other offenses, arising out of the shooting. In 2013, however, we held that the 2007 trial was fatally infected by both ineffective assistance of counsel and prosecutorial error, which combined to give these three witnesses a false aura of veracity.

In 2014, after another jury trial in which the same three witnesses testified, defendant was once again found guilty as charged. We will hold that this time, there was no ineffective assistance of counsel and no prosecutorial error. Moreover, this time, the credibility of these three witnesses was fully litigated in front of the jury; we will hold that their testimony constituted substantial evidence sufficient to support the verdict. Finally, we will hold that the trial court did not err by failing to give accomplice instructions, or if it did, the error was harmless. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

A. *The Prosecution Case*.

1. *Background*.

As defendant admitted at trial, he and his younger brother Bryant sold crack at a house on Seventh Street near Chicago Avenue in Riverside. Defendant also sold crack at

an apartment on Chicago Avenue near Linden Street. Defendant had a burgundy Acura with tinted windows.

2. *Testimony of Sheila Chapman*.

As of 2003, Sheila Chapman[1] was working as a prostitute. She used heroin daily; she also used cocaine.

Chapman had a close friend named Tanya Morris. Morris, too, used cocaine, which she bought from defendant. According to Chapman, a lot of people told her that she resembled Morris when seen from behind; they both wore burgundy ponytails.

Chapman testified that on the night of February 27-28, 2003, sometime after 12:30 a.m. or 1:00 a.m., she was walking west on University Avenue. A red Honda Civic going in the opposite direction slowed down as it went past her. The driver made a U-turn and started following her slowly. At one point, he pulled up next to her. She looked at him and he looked at her; they were about three feet apart. But "when he seen I wasn't who he thought I was," she testified, "he kept going." Shortly after that,[2] she heard four gunshots.

Chapman then saw a man wearing a black hoodie come out of a parking lot next to a Mexican restaurant and go across University, "walking fast." She saw police in the area, and somebody told her that her friend Morris was dead in the parking lot.

---

[1] Chapman admitted multiple drug, theft, and weapons-related prior convictions, including both misdemeanors and felonies.

[2] She testified that she heard the gunshots "four or five minutes" later. However, she also testified that she took only a "few steps" before hearing the gunshots.

At trial, Chapman identified defendant as the driver of the red car. In December 2003, she identified defendant in a photo line-up.

Chapman testified that the red car did not have tinted windows. However, she also testified that she could not remember whether the windows were up or down — just that she could see the driver's face.[3]

Chapman identified Robert Pruitt as her boyfriend. At some point,[4] Pruitt told Chapman that he saw defendant shoot Morris in the head.

3. *Testimony of Robert Pruitt*.

As of 2003, Pruitt[5] was using crack cocaine daily. He denied that Chapman was his girlfriend; he testified that they just "h[u]ng out" and used drugs together. He knew Morris "from the streets" and he had also used drugs with her.

---

[3] Defendant claims that Chapman described the car as a two-door, which would be significant because defendant's car was a four-door. However, Chapman specifically testified that she did not remember how many doors the car had. When asked, "Do you remember telling [a detective] it was a two-door car?," she replied, "Yeah. There was something about the car. I told him I wanted a car like that." This seems to mean that she told him "something about the car," but not necessarily that it had two doors.

[4] Chapman was arrested a day or so after the shooting. She testified that Pruitt first told her this at a motel, before her arrest. However, she also testified that he first told her this after her arrest, while they were both in a holding cell.

At a prior hearing, she had testified that she did not know Pruitt was even in the area of the shooting until she came to court for the preliminary hearing.

[5] Pruitt admitted prior convictions for "[g]rand theft auto, drug cases, [and] a couple of gun charges," as well as two prior convictions for robbery.

Pruitt saw defendant almost every day and knew him well enough for them to say "hi" to each other. He understood that defendant was a member of the Main Street Crips. Pruitt himself had previously been a member of the East Coast Crips, a rival gang.

On the night of February 27-28, 2003, Pruitt was staying at the Economy Inn on University Avenue. Sometime after midnight, he was sitting out on the steps in front of the Economy Inn.[6] By dint of using cocaine, he had not slept for nearly three days.

He saw Morris, with three other people,[7] walking west on University. One man with her was holding a paper bag that "looked like [it] had a bottle or something in it." They went into the parking lot of the Mexican restaurant next door.

A couple of minutes later, Pruitt saw defendant, also walking west. Defendant was wearing a black hoodie. Pruitt hailed defendant, but defendant replied, "Not now. I've got to take care of something." He kept walking toward the parking lot.

"Because there was word on the street that something had happened," Pruitt got up and moved to a planter, from which he could see into the parking lot. Morris and her companions were standing in a circle in the parking lot. Defendant was standing about three feet away from them.

Suddenly, defendant pulled out a semiautomatic handgun and started shooting at the people in the circle. Pruitt saw somebody fall. At the preliminary hearing, he had

---

[6] Initially, Pruitt testified that he was with Chapman. However, after his recollection was refreshed, he testified that he was with a different woman.

[7] At first, he testified that Morris was with three men. After his recollection was refreshed, he testified that Morris was with two men and a girl he knew only as "Punkin."

testified that he saw the male victim get shot. At trial, he testified variously that he did not see who was shot, that he saw Morris get shot, and that he saw both victims get shot.

After the first or second shot, Pruitt "got out of there." He went up to his motel room, looked out the window, and saw two bodies in the parking lot. After the police arrived, he "went back down there like everybody else" and saw the bodies again.

A few days later, defendant told Pruitt, "Don't snitch." He added, "[My] homies think [I] should . . . smoke you" because Pruitt had seen the shooting.

According to Chapman, Pruitt told her that he was at a vacant house on Seventh Street when he saw the shooting, not at the Economy Inn.

In March 2003, Pruitt was arrested for transportation of cocaine. As a three-striker, he was facing a potential sentence of 25 years to life.[8] In January and February 2004, he testified at defendant's preliminary hearing. He admitted that he was "hoping to get some kind of deal for [his] testimony . . . ."

In July 2004, Pruitt was in fact sentenced to 25 years to life in prison. In July 2007, over the prosecution's objection, a judge told him that, if he testified in defendant's case both truthfully and "relatively consistently with his preliminary hearing testimony," his sentence would be reduced to 10 years. In November 2007, Pruitt testified in defendant's case, and in January 2008, he was duly resentenced to 10 years.

---

[8] Chapman admitted that, when she gave a statement to the police, she knew that Pruitt was charged in a three strikes case.

On March 29, 2003, Detective Jeffrey Joseph interviewed Pruitt. Pruitt said that he saw defendant and Morris in the parking lot immediately before the shooting, but he added that he only heard the shooting — he did not see it.

4. *The crime scene.*

Around 1:30 a.m., the police received "numerous" calls of shots fired near Douglass and University. They found the dead bodies of two people — later identified as Morris and Darrin Hutchinson — lying in the parking lot. Hutchinson was clutching a black plastic bag. On the ground, there were three unopened cans of malt liquor.

Autopsies revealed that Morris and Hutchinson had each been shot twice in the head. Two bullets, at least one of which was fired from close range, hit Morris in the right side of the head; they did not exit.[9] One bullet, fired from close range, hit Hutchinson in the left side of the head and one bullet hit him in the back of the head.

5. *Testimony of Michael Newell.*

Michael Newell[10] was a member of the Main Street Crips until he quit in 2012. He had known defendant since either 1983 or 1988; however, for much of that time Newell was in prison. He testified that defendant and defendant's brother were also members of the Main Street Crips.

---

[9] Pruitt told Chapman that defendant shot Morris in the front of the head. He added that he saw Morris's "brains fly out of her head."

[10] When Newell testified, he was serving a sentence of 49 years to life for armed robbery with great bodily injury. He admitted additional prior convictions for assault, drug sales, burglary, receiving stolen property, and armed robbery. He admitted that he was not "an honest person," though he claimed he would not lie under oath.

In February 2003, Newell moved from Los Angeles to Riverside. Defendant and defendant's brother let him live at their house on Seventh Street. All three of them sold crack there. The drug sales were for "personal gain," not for the benefit of the Main Street Crips.

In February or March 2003, Newell heard that Morris had been murdered. He asked defendant about the murder. Defendant said he had killed Morris and a second person because they had robbed him of drugs.

Thereafter, Newell was arrested for a drug offense. As a three-striker, he was facing a potential sentence of 25 years to life.

In March 2003, while in custody, Newell said he wanted to speak to someone about Morris's murder. He did so because he was upset with defendant's brother and also because he "didn't like the way [defendant] talked to [him]."

As a result, Detective Joseph interviewed Newell. Newell said he had talked to defendant about the shooting, and defendant had said, "I'm the one that shot the motherfuckers. I'm the one that killed them . . . ." Newell also told Detective Joseph about defendant's and defendant's brother's drug enterprise.

According to Detective Joseph, initially, Newell said that as long as he was in custody, he had nothing to say. Detective Joseph offered to contact the district attorney if Newell gave him good information. Newell also said "he didn't want to speak to the uniformed cops because . . . they couldn't do anything for him." He added, "I know if I work with you, I will come out on top." In his statement, Newell said that defendant admitted killing two males.

As a result of Newell's statement to Detective Joseph, the police raided both of defendant's crack houses and arrested his brother. Newell prudently moved back to Los Angeles.

On July 4, 2003, defendant's sister phoned Newell and asked him to come out to Riverside because she needed him. After he got to the Seventh Street house, defendant and his sister showed up, along with their mother and defendant's 19-year-old nephew.

Defendant said his brother had told him that Newell snitched. He punched Newell. Everybody present then "jumped" him and started "stomping" him. They all called him a snitch.[11]

Newell was knocked out. When he came to, defendant was holding his foot. Defendant then twisted it, breaking Newell's ankle. Someone hit Newell's index finger with a brick. They stopped beating him only when he promised to "make it right."

As a result of the beating, Newell was in the hospital for three weeks. He was left with permanent injuries, including two lost teeth, a crooked index finger, and two metal rods and seven screws in his right ankle.

In 2004, Newell told a defense investigator that he had lied to Detective Joseph. He had been high on crack and cognac. The police told him, "Give us something to go

---

[11] Defendant claims the family was angry only because Newell had snitched on defendant's brother, not because he had snitched on defendant. The cited portions of the record, however, do not support this. Somewhat to the contrary, defendant's brother told Newell at some point that he had heard "the whole tape" of Newell's statement to Detective Joseph.

on so we can let you walk." He gave them a statement only "so he could get back on University Avenue and score some dope[] and get back to LA."

In 2007, in a previous proceeding, Newell testified that when he talked to Detective Joseph, he was high on "crack, PCP, and alcohol and could have told almost anything[.]"

At trial, Newell testified that his 2004 and 2007 recantations were not true. He explained that, at the time, he was trying to protect defendant because they were both still Main Street Crips.

At the time of trial, Newell was in protective custody because he was considered a snitch. He had been "jumped" three times in prison. He complained, "[E]very time I talk to you all, I get beat up."

6. *Gang evidence.*

Detective Michael Stamps testified as a gang expert. In his opinion, as of February 2003, defendant was an active member of the Main Street Crips. In December 1997, defendant had admitted to Detective Stamps that he was a member of the Main Street Crips, and in August 2002 and October 2002, he had admitted to other officers that he was a member of the Main Street Crips. Also, defendant had two "MSC" tattoos.

Detective Stamps testified that defendant's brother was also a member of the Main Street Crips. In his opinion, defendant was selling drugs on behalf of his gang because he was doing so in association with other gang members.

According to Detective Stamps, if someone ripped off a Crip gang member who was selling drugs, the gang member would kill or attempt to kill that person. He added

that such a killing would further the activities of the gang because it would "send[] a message to the street."

Detective Erik Shear also testified as a gang expert. According to Detective Shear, the Main Street Crips are a gang that originated in Los Angeles. The gang has common signs and symbols, including "MSC" and "Mafia." Its primary activities include murder, shootings, robbery, burglary, extortion, identity theft, and selling cocaine and marijuana.

The following predicate offenses were introduced to show a pattern of criminal activity:

1. Eugene "Knockout" Massey, a member of the Main Street Crips, shot and killed a member of a rival gang. As a result, in August 2000, Massey was arrested, and in February 2001, he was convicted of murder.

2. Charles "Monster" Yoakum, a member of the Main Street Crips, participated in a shootout with members of a rival gang; a 14-year-old girl was caught in the crossfire and killed. As a result, February 2001, Yoakum was arrested, and in November 2001, he was convicted of manslaughter.

Detective Shear agreed that, "if a Main Street Crip gang member was ripped off in a drug sale situation," there would be "a relatively immediate and violent response . . . ." The rationale would be to protect the gang's "money-making activities" by deterring rip-offs.

B. *The Defense Case*.

Defendant[12] testified that in 1979, when he was 12, he joined the Main Street Crips. In 1989, however, he left the gang. He had admitted to police officers that he was a former member, not that he was a current member.

When defendant was 17, he had cancer; as a result, his fibula was removed. He had to wear a leg brace. He walked with a limp; he could not walk very far or very fast.

Defendant knew Morris and considered her a friend; she bought drugs from him a few times a year. She had never ripped him off and he had no reason to be upset with her.

On the night of February 27-28, 2003, defendant and his friend, Alex Camarena, went to Orange County to see Camarena's then-girlfriend, Gracie. On the way there, Camarena drove defendant's car, because defendant did not know where Gracie lived. They picked Gracie up, then went to visit a friend of hers named Berna (or Brenda). Defendant did not know Gracie or Berna's last name.

Defendant and Camarena left Orange County between 1:30 and 2:30 a.m. Defendant drove. Camarena gave him directions to the freeway, then went to sleep. The drive took about 45 minutes. When they got back to Seventh Street, around 3:00 a.m., the police had already blocked off the crime scene.

In March 2003, defendant's sister told him that the police wanted to question him about Morris's murder. He went to the police station voluntarily, where Detective Joseph

---

[12] Defendant admitted a prior conviction for possession of cocaine for sale.

interviewed him. Defendant told him that, when the shooting occurred, he and Camarena were in Orange County, visiting friends.

In June or July 2003, defendant's sister phoned him and said that Newell was at the Seventh Street house, "trying to sell dope[] and strong-arming smokers in the yard." Defendant came over and told Newell to stop. Newell refused and threw a punch at defendant. They started fighting. Newell hit defendant with a brick; defendant got the brick away from him and hit him with it. Newell also tried to kick defendant in his bad leg, so defendant grabbed Newell's leg and twisted it. Newell screamed. He stopped fighting and "limped away."

Defendant's sister, Vickie Guillmeno,[13] corroborated defendant's testimony regarding: (1) his ex-gang status, (2) his leg brace, (3) his fight with Newell, and (4) his voluntary submission to questioning.

Camarena[14] corroborated defendant's alibi. Like defendant, Camarena did not remember either Gracie's or Berna's last name. He explained, "[Gracie's] last name has always been so hard for me because it's long." He also explained, "I had many girlfriends at that time." However, he admitted dating Gracie "[o]ff and on for a year," during which they were "in constant touch[.]"

Camarena claimed that in March 2003, when the police interviewed him, he told them about the trip to Orange County and gave them Gracie's phone number.

---

[13] Defendant's sister admitted a prior conviction for selling cocaine.

[14] Camarena admitted two prior convictions for possession of cocaine for sale and one for assault with a deadly weapon.

II

PROCEDURAL BACKGROUND

In 2004, defendant was charged with:

Counts 1 and 2: First degree murder (Pen. Code, § 187, subd. (a)), with gang and multiple-murder special circumstances (Pen. Code, § 190.2, subds. (a)(3), (a)(22)) and with enhancements for personally and intentionally discharging a firearm, causing death (Pen. Code, § 12022.53, subd. (d)).

Count 3: Unlawful possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).

Count 4: Unlawful possession of ammunition (Pen. Code, § 12316, subd. (b)(1)).

Count 5: Threatening a witness (Pen. Code, § 140), with an enhancement for personally inflicting great bodily injury (Pen. Code, § 12022.7, subd. (a)).

He was also charged with three 1-year prior prison term enhancements. (Pen. Code, § 667.5, subd. (b).)

In 2007, after a jury trial, defendant was found guilty on all counts; all enhancements were either found true or admitted by defendant.

Defendant appealed. In 2010, we held that there had been prosecutorial error, but it had been forfeited for purposes of appeal; we also held that defense counsel had rendered ineffective assistance by failing to impeach Pruitt, but defendant had not shown prejudice. Finally, we held that the trial court had erred by denying defendant's posttrial

Marsden motion[15] without a hearing. We therefore remanded with directions to hold a hearing on the *Marsden* motion. (*People v. Griffin* (Jan. 27, 2010, E045561) [nonpub. opn.] (*Griffin I*).)

On remand, the trial court granted the *Marsden* motion and appointed new counsel. Defendant's new counsel brought a new trial motion based on ineffective assistance of counsel. The trial court denied the motion; it ruled that defense counsel had indeed rendered ineffective assistance — by failing to impeach Chapman, Pruitt, and Newell, by failing to rehabilitate Camarena, and by failing to object to prosecutorial error — but that the ineffective assistance was not prejudicial.

Defendant appealed again; he also filed a habeas petition. In 2013, we held that defendant had demonstrated prejudice with respect to counts 1 through 4, and thus he was entitled to a new trial on those counts. (*People v. Griffin* (June 5, 2013, E055126) at p. 40 (*Griffin II*).) In the habeas proceeding, we issued an order to show cause, returnable in the trial court, with respect to whether defendant was entitled to relief on count 5. The People stipulated to the reversal of count 5 so that all of the counts could be retried together.

In 2014, after another jury trial, once again, defendant was found guilty on all counts, and all enhancements (except for two of the prior prison term enhancements, which had become time-barred) were either found true or admitted by defendant.

---

[15] A *Marsden* motion is a motion to discharge existing appointed counsel, based on ineffective assistance, and to appoint new counsel. (*People v. Marsden* (1970) 2 Cal.3d 118.)

Defendant was sentenced to four consecutive life terms — two without possibility of parole, and two with 25-year minimum parole periods — plus seven years.

III

THE SUFFICIENCY OF THE EVIDENCE

Defendant contends that there was insufficient evidence that he was the shooter.

"'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

Chapman saw defendant in the area of the shooting immediately before it took place. He followed her, evidently by mistake — inferably he was looking for Morris, whom she resembled when seen from behind. After the shooting, she saw a man in a black hoodie walking away from the parking lot.

Pruitt saw Morris and several black men (presumably including Hutchinson) go into the parking lot. Shortly afterward, he saw defendant go the same way. Defendant

was wearing a black hoodie. He told Pruitt, "I've got to take care of something." Pruitt then saw defendant, in the parking lot, firing a gun toward Morris and her companions.

Each victim was shot twice in the head, from close range, execution-style. Defendant admitted to Newell that he killed Morris and another person because they had robbed him of drugs. Defendant said, "I'm the one that shot the motherfuckers. I'm the one that killed them . . . ." After Newell disclosed this information to the police, defendant beat him severely while calling him a snitch.

In ruling on defendant's motion for new trial, the trial court correctly summarized this evidence: "[Y]ou have one witness saying the defendant told him he killed them. One witness saying he saw defendant kill [them], and another witness saying she saw defendant in the area at the time." This was sufficient evidence that defendant was the shooter.

Defendant argues, however, that Chapman, Pruitt, and Newell were not credible. He rehearses in detail all of the evidence that tended to impeach them — their drug use, their prior felony convictions, their individual motivations to lie, and the inconsistencies in and among their statements.

We must decline defendant's invitation to reweigh the evidence. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single

witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

"'"'Except in . . . rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution . . . .' [Citation.]' [Citation.] 'The standard for rejecting a witness's statements on this ground requires '"'either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.'"' [Citation.]' [Citation.]" (*People v. Brown* (2014) 59 Cal.4th 86, 105.) The testimony that defendant complains about was neither physically impossible nor demonstrably false.

Defendant quotes our statement in his second appeal that "[a]t most, we have a strong suspicion that defendant is guilty." (*Griffin II* at p. 39.) This is taken out of context. Preliminarily, we noted that, in defendant's first trial, his attorney's ineffective assistance gave the prosecution witnesses "unwarranted credibility" at the same time as it "diminished the credibility of his own client as well as his client's alibi witness." (*Id.* at p. 38.) We also noted that "the prosecutor's actions reinforced trial counsel's ineffective assistance." (*Ibid.*) We then concluded that, "*Under these circumstances, trial counsel's ineffective assistance thoroughly undermines our confidence in the jury's verdict* . . . . At

most, we have a strong suspicion that defendant is guilty. There is a reasonable probability that, absent trial counsel's unprofessional errors, a jury conscientiously applying the 'beyond a reasonable doubt' standard of proof would have found defendant not guilty." (*Id*. at p. 39, italics added.)

By contrast, in his second trial, we find no ineffective assistance of counsel and no prosecutorial misconduct. (See parts IV & V, *post*.) As far as this record reveals, defense counsel impeached the prosecution witnesses effectively — which is precisely why defendant has a record from which to argue (albeit to no avail) that they were not credible. Defense counsel also presented defendant's alibi and his alibi witness effectively. Once that was done, it was up to the jury to make the call. "'[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt.' [Citation.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1290.)

We therefore conclude that there was sufficient evidence that defendant was the shooter to support his convictions on counts 1 through 4.

IV

INEFFECTIVE ASSISTANCE: FAILURE TO MOVE TO EXCLUDE PRUITT'S TESTIMONY

Defendant contends that his trial counsel rendered ineffective assistance by failing to move to exclude Pruitt's testimony as the product of compulsion.

In defendant's first appeal, we rejected an essentially identical contention, ruling that Pruitt's testimony was not impermissibly compelled. (*Griffin I* at pp. 18-22.) We relied on Supreme Court authority upholding "the admission of testimony subject to

grants of immunity which simply suggested the prosecution *believed* the prior statement to *be* the truth, and where the witness understood that his or her sole obligation was to testify fully and fairly." (*People v. Boyer* (2006) 38 Cal.4th 412, 455.) This is now the law of the case. (See generally *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 374, fn. 6.)

Defendant argues that the law of the case doctrine does not apply because new facts came out after the first appeal. (See *People v. Alexander* (2010) 49 Cal.4th 846, 871.) However, he does not point to any new facts that were relevant to whether Pruitt's testimony should be excluded, and we do not perceive any.

Admittedly, in his new trial motion, defendant showed that there were numerous contradictions between Pruitt's preliminary hearing testimony and his testimony at trial, and that his counsel rendered ineffective assistance by failing to use these to impeach Pruitt. (*Griffin II*, at pp. 2-3.) In our opinion in defendant's second appeal, we observed that effective counsel would have argued that, if Pruitt lied at the preliminary hearing, "the plea deal effectively required Pruitt to continue to lie." (*Griffin II*, at p. 28.) However, as we had already held, in *Griffin I*, a witness's plea deal may be impeaching even when it is not grounds for excluding the witness's testimony. (*Griffin I*, at pp. 22-23.) Thus, *Griffin II* does not conflict with *Griffin I* on this point.

Even aside from law of the case, we note that, before the second trial, Pruitt received the benefit of his plea bargain — his sentence was reduced from 25 years to life to 10 years. Thus, there was no longer any factual basis for a conclusion that his

testimony was compelled. The trial court would have had to deny any motion to exclude his testimony. Accordingly, there was no ineffective assistance of counsel.

V

PROSECUTORIAL MISCONDUCT: FAILURE TO PREVENT A WITNESS FROM TESTIFYING TO EXCLUDED MATTERS

Defendant claims that the prosecutor committed misconduct by failing to prevent a prosecution witness from testifying to matters that the trial court had ordered excluded. To the extent that his trial counsel forfeited this contention by failing to object and to request an admonition, defendant contends that he rendered ineffective assistance.

A. *Additional Factual and Procedural Background*.

1. *The trial court's earlier evidentiary rulings.*

In a series of Evidence Code section 402 hearings outside the presence of the jury, Pruitt, Newell, and a potential witness who ultimately was not called each testified that they had heard that Morris was killed because she robbed defendant. Each time, the trial court excluded this testimony. It ruled that it was inadmissible hearsay, unless it was offered for a nonhearsay purpose, and that even then it was more prejudicial than probative under Evidence Code section 352.

2. *Detective Joseph's testimony*.

During the direct examination of Detective Joseph, there was this dialogue:

"Q. Did [Mr. Pruitt] indicate what he saw? Would maybe looking at a transcript refresh your recollection?

"A. Yes."

Detective Joseph reviewed the transcript of his interview of Pruitt. The prosecutor then asked:

"Q. . . . Is your memory refreshed?

"A. Yes. [¶] . . . [¶] . . .

"Q. And what did Mr. Pruitt say in that regard?

"A. He indicated that Mr. Griffin had approached him. That there were at least two other individuals with him. I think he identified one as [Morris]. And they had a brief conversation. He talked to him about being — he said he heard he had been ripped off. And that Mr. —

"[DEFENSE COUNSEL]: I'm going to move to strike that last part as multiple hearsay. Lack of foundation.

"THE COURT: Sustained. I'll strike that portion of it. I'm going to strike the reference he heard he had been ripped off."

B. *Discussion.*

"'A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact.' [Citation.] 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion — and on the same ground — the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' [Citation.]" (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1219.)

"'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

Here, defense counsel failed to raise the necessary objection below. He did object to the evidence, but he did not object on the specific ground of prosecutorial error, as required. Moreover, he did not request an admonition to the jury. Accordingly, we consider defendant's contention exclusively as a matter of ineffective assistance.

"The two-prong standard governing claims of ineffective assistance of counsel is well settled. ""'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]"'" [Citations.]" (*People v. Johnson* (2016) 62 Cal.4th 600, 653.)

"[F]or a prosecutor intentionally to elicit inadmissible evidence is misconduct [citation] . . . ." (*People v. Gray* (2005) 37 Cal.4th 168, 216.) It is also misconduct to violate an evidentiary ruling of the trial court, intentionally or unintentionally. (*People v. Friend* (2009) 47 Cal.4th 1, 33.) "If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement. [Citation.]" (*People v. Warren* (1988) 45 Cal.3d 471, 482.) However, "'a prosecutor cannot be faulted for a witness's nonresponsive answer that the

prosecutor neither solicited nor could have anticipated.' [Citation.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 998.)

Here, the prosecutor asked Detective Joseph what Pruitt said he "saw." After a pause in which Detective Joseph reviewed the transcript, the prosecutor asked again what Pruitt said "in that regard." Unfortunately, Detective Joseph had evidently become distracted from the narrow thrust of the question; he started reciting *everything* that Pruitt had said, including what Pruitt said he had *heard*. This was a "nonresponsive answer that the prosecutor neither solicited nor could have anticipated." Because the prosecutor did not ask Detective Joseph any question calling for what Pruitt said he had heard, he had no reason to warn Detective Joseph not to testify to this. In sum, then, the prosecutor did not commit misconduct, intentionally or unintentionally.

Separately and alternatively, the asserted misconduct was not prejudicial, for three reasons.

First, there was other, stronger evidence of defendant's motive. Newell testified that defendant admitted to his face that "he murdered [Morris] and another person because they had jacked him . . . [of] drugs[.]" The fact that Pruitt had also heard about the rip-off added little to this.

Second, while we know from the Evidence Code section 402 hearings what Detective Joseph was trying to say, he did not say it clearly. All he actually said was, "He talked to him about being — he said he heard he had been ripped off." It was not clear whether Pruitt said this to defendant or defendant said this to Pruitt. Even more important, Detective Joseph never specified that it was Morris (and/or Hutchinson) who

supposedly ripped defendant off. Somewhat to the contrary, he indicated that Morris was present when this statement was made.

Third, "the trial court sustained defendant's objection to the question and answer . . . and struck the answer, thus eliminating any possible prejudice from that alleged instance of misconduct on the part of the prosecutor." (*People v. Riggs* (2008) 44 Cal.4th 248, 299-300; accord, *People v. Granados* (1957) 49 Cal.2d 490, 494.) Defendant argues that the evidence was so prejudicial that the order striking it could not cure the prejudice. Based on our first two reasons, we disagree.

Because the prosecutor did not commit misconduct, and because the asserted misconduct was not prejudicial, we conclude that defense counsel did not render ineffective assistance.

VI

FAILURE TO INSTRUCT ON NEWELL AS AN ACCOMPLICE

Defendant contends that the trial court erred by failing to give accomplice instructions with respect to Newell.

"If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining 'accomplice.' [Citations.] It also must instruct that an accomplice's incriminating testimony must be viewed with caution [citation] and must be corroborated [citations]. If the evidence establishes that the witness is an accomplice as a matter of law, it must so instruct the jury [citation]; otherwise, it must instruct the jury to determine whether the witness is an accomplice [citation]. [Citations.]" (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)

"An 'accomplice' is 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' [Citation.]" (*People v. Carrasco* (2014) 59 Cal.4th 924, 968.) "This definition encompasses all principals to the crime [citation], including aiders and abettors and coconspirators." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90.)

"'[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages, or instigates, the commission of the crime.' [Citations.]" (*People v. Johnson*, *supra*, 62 Cal.4th at p. 630.)

"'A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. . . . .' [Citation.]" (*People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 431.)

"A consequence that is reasonably foreseeable is a natural and probable consequence under this doctrine. 'A nontarget offense is a "'natural and probable consequence'" of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability "'is measured by whether a reasonable person in the [person]'s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.'" [Citation.] Reasonable foreseeability "is a factual issue to be

resolved by the jury." [Citation.]' [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 611, italics omitted.)

Newell testified that he sold crack cocaine with defendant and defendant's brother at the house on Seventh Street. Defendant and his brother would pay him "a small sum" — $1,000 or $1,500 a week — and then split the rest of the proceeds between themselves. When asked what would happen if a drug buyer ripped off a drug dealer, Newell answered that the drug dealer would: "Get them. Kill him. . . . Find them and hurt them." Both gang experts agreed that, if a gang member who was selling drugs was ripped off, he would respond by trying to kill the perpetrator.

Defendant concludes that Newell was an accomplice in defendant's drug-dealing business. He then argues that it was reasonably foreseeable that he would murder anybody who ripped off his business, and therefore Newell was also an accomplice in the murders. This assumes, however, that it was reasonably foreseeable that someone would try to rip off defendant's business. But there was no evidence of that.

To the contrary, defendant testified that nobody had ever ripped him off. He added, "I wasn't worried about anybody ripping me off." He would not let anyone inside the house. He would not sell drugs to anyone he did not know. He kept five or six pit bulls tied up at strategic locations to alert him to intruders. The very evidence that defendant relies on — the evidence that he (or any other gang member selling drugs) would kill anyone who ripped him off — tends to show that it was *not* reasonably foreseeable that anybody would try to rip defendant off. In the absence of any other

evidence on the point, it would be purely speculative to conclude that Newell could reasonably foresee that somebody would rip defendant off.

Separately and alternatively, the asserted error was harmless.

The federal Constitution does not require instructions on accomplice testimony. (See *People v. Williams* (2010) 49 Cal.4th 405, 456; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) Accordingly, the failure to give an instruction concerning accomplice testimony is harmless unless it is reasonably probable that, had it been given, the defendant would have enjoyed a more favorable outcome. (*People v. Lewis* (2001) 26 Cal.4th 334, 371.)

Under this standard, "'"[a] trial court's failure to instruct on accomplice liability . . . is harmless if there is sufficient corroborating evidence in the record." [Citation.] "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." [Citation.] The evidence is "sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." [Citation.]' [Citation.]" (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1353, disapproved on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3.)

Defendant proceeds on the assumption that the reasonable probability standard and the sufficient corroboration standard are two different standards. He urges us to follow the reasonable probability "line of authority," which he claims is "better reasoned." As he concedes, however, in *People v. Williams*, *supra*, 49 Cal.4th 405, the Supreme Court applied both standards, without distinguishing between them. (*Id*. at p. 456.) He

rationalizes *Williams* as "somewhat of a hybrid . . . ." We reject the notion that the Supreme Court has switched back and forth between two standards. Rather, as *Williams* demonstrates, the sufficient corroboration standard simply describes how the reasonable probability standard applies in the context of accomplice instructions.

In this case, there was more than sufficient evidence to corroborate Newell. The testimony of Pruitt and Chapman also tended to connect defendant to the crime. The fact that defendant beat Newell for snitching further corroborated Newell's testimony. We therefore conclude that any failure to instruct on accomplice testimony was harmless.

VII

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

MILLER
J.